

To be Argued by:
MARIANNE STECICH
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

GREENTREE REALTY, LLC,

Petitioner-Respondent,

— against —

THE VILLAGE OF CROTON-ON-HUDSON, THE VILLAGE BOARD
OF TRUSTEES OF THE VILLAGE OF CROTON-ON-HUDSON,
THE VILLAGE OF CROTON-ON-HUDSON ZONING BOARD OF
APPEALS and DANIEL O'CONNOR, in his official capacity, as the
VILLAGE BUILDING INSPECTOR,

Respondents-Appellants.

Docket No.:
2006-08417

Action 1
Index No.
11872/05

VILLAGE OF CROTON-ON-HUDSON,

Plaintiff-Appellant,

— against —

NORTHEAST INTERCHANGE RAILWAY, LLC
and GREENTREE REALTY, LLC,

Defendants-Respondents.

Action 2
Index No.
22176/05

BRIEF FOR RESPONDENTS-APPELLANTS IN ACTION NO. 1 AND PLAINTIFF-APPELLANT IN ACTION NO. 2

STECICH MURPHY & LAMMERS, LLP
828 South Broadway, Suite 201
Tarrytown, New York 10591
(914) 674-4100

ARNOLD & PORTER LLP
399 Park Avenue
New York, New York 10022
(212) 715-1000

*Attorneys for Respondents-Appellants in Action No. 1
and Plaintiff-Appellant in Action No. 2*

Westchester County Clerk's Index Nos. 11872/05 and 22176/05

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

-----X
GREENTREE REALTY, LLC,

Petitioner-Respondent,

- against -

THE VILLAGE OF CROTON-ON-HUDSON, THE
VILLAGE BOARD OF TRUSTEES OF THE VILLAGE
OF CROTON-ON-HUDSON, THE VILLAGE OF
CROTON-ON-HUDSON ZONING BOARD OF
APPEALS, and DANIEL O'CONNOR, in his official
capacity, as the VILLAGE BUILDING INSPECTOR,

Docket Number:
2006-8417

Respondents-Appellants.

-----X
VILLAGE OF CROTON-ON-HUDSON,

Plaintiff-Appellant,

- against -

NORTHEAST INTERCHANGE RAILWAY, LLC
and GREENTREE REALTY, LLC,

Defendants-Respondents.

-----X

STATEMENT PURSUANT TO C.P.L.R. 5531

1. The index number of the case in the court below is 11872/05. The case was consolidated with another case, the index number of which is 22176/05.

2. The full names of the original parties are as stated in the first block of the caption. Northeast Interchange Railway, LLC and Greentree, LLC, as indicated in the second block of the caption, were subsequently added as parties.

3. The action was commenced in Supreme Court, Westchester County.

4. The original action was commenced by the filing of a verified petition on or about July 21, 2005. Issue was joined by the service of an answer by the Village respondents on October 17, 2005. The second action was commenced by the filing of an amended summons and complaint on or about December 27, 2005. Issue was joined by the service of answers by Greentree Realty and Northeast Interchange Railway on or about June 15, 2006.

5. The actions pertain to whether a transfer station can operate as a prior nonconforming use in the Village. The order appealed tolled the Croton-on-Hudson Zoning Code's one-year discontinuance period for nonconforming uses.

6. The appeal is from an order of Hon. Francis A. Nicolai, A.J.S.C., dated July 31, 2006, and entered in the office of the Westchester County Clerk on July 31, 2006.

7. The appeal is being prosecuted on a full reproduced record.

Table of Contents

Table of Authorities	ii
Statement of the Question Presented	1
Statement of Facts	2
Summary of Argument	10
Argument	11
Point I It Is Settled Law that a Zoning Provision That Prohibits the Operation of a Nonconforming Use After the Use Has Been Discontinued for A Fixed Period Must Be Enforced, Irrespective of an Intent or Efforts to Resume the Use During the Lapse Period	11
Point II Even If It Were Relevant to Tolling the Statutory Discontinuance Period – Which It Is Not – Greentree and NIR Did Not Do “All That Is Possible To Resume the Nonconforming Use.”	18
Point III That Greentree May Lose Valuable Property Rights Is Not Relevant to the Operation of the Croton-on-Hudson Discontinuance Provision for Nonconforming Uses	23
Conclusion	25
Certification of Compliance	26

Table of Authorities

Cases

<u>550 Halstead Corp. v. Zoning Board of Appeals of the Town/Village of Harrison</u> , 1 N.Y.3d 561, 772 N.Y.S.2d 249 (2003)	12
<u>Darcy v. Zoning Board of Appeals of the City of Rochester</u> , 185 A.D.2d 624, 586 N.Y.S.2d 44 (4 th Dep't 1992)	13
<u>Incorporated Village of Ocean Beach v. Stein</u> , 110 A.D.2d 820, 488 N.Y.S.2d 239 (2d Dep't 1985)	22
<u>Metro Enviro Transfer, LLC v. Village of Croton-on- Hudson</u> , 5 N.Y.3d 236, 239-40, 800 N.Y.S.2d 535, 536-37 (2005), <u>affirming</u> 7 A.D.3d 625, 777 N.Y.S.2d 170 (2d Dep't 2004)	2
<u>Pelham Esplanade, Inc. v. Board of Trustees of the Village of Pelham Manor</u> , 77 N.Y.2d 66, 563 N.Y.S.2d 759 (1990)	12
<u>Spicer v. Holihan</u> , 158 A.D.2d 459, 550 N.Y.S.2d 943 (2d Dep't 1990)	14,23
<u>Sun Oil Co. v. Board of Zoning Appeals of the Town of Harrison</u> , 57 A.D.2d 627, 393 N.Y.S.2d 760 (2d Dep't 1977), <u>affirmed</u> , 44 N.Y.2d 995, 408 N.Y.S.2d 502 (1978)	13,14, 23-24
<u>Swartz v. Wallace</u> , 87 A.D.2d 926, 450 N.Y.S.2d 65 (3d Dep't 1982)	14
<u>Toys "R" Us v. Silva</u> , 89 N.Y.2d 411, 654 N.Y.S.2d 100 (1996)	12,15

<u>Two Wheel Corp. v. Fagiola</u> , 96 A.D.2d 1098, 467 N.Y.S.2d 66 (2d Dep't 1983)	22
<u>Village of Waterford v. Amna Enterprises, Inc.</u> , 27 A.D.3d 1044, 812 N.Y.S.2d 169 (3d Dep't 2006)	16,23
<u>Vite, Inc. v. Zoning Board of Appeals for Town of Greenville</u> , 282 A.D.2d 611, 723 N.Y.S.2d 239 (2d Dep't 2001)	15,23
 <u>Statutes</u>	
Croton-on-Hudson Zoning Code § 230-53.A(3)	passim

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

-----X
GREENTREE REALTY, LLC,

Petitioner-Respondent,

- against -

THE VILLAGE OF CROTON-ON-HUDSON, THE
VILLAGE BOARD OF TRUSTEES OF THE VILLAGE
OF CROTON-ON-HUDSON, THE VILLAGE OF
CROTON-ON-HUDSON ZONING BOARD OF
APPEALS, and DANIEL O'CONNOR, in his official
capacity, as the VILLAGE BUILDING INSPECTOR,

Respondents-Appellants.

-----X
VILLAGE OF CROTON-ON-HUDSON,

Docket No.
2006-8417

Plaintiff-Appellant,

- against -

NORTHEAST INTERCHANGE RAILWAY, LLC
and GREENTREE REALTY, LLC,

Defendants-Respondents.

-----X

Statement of the Question Presented

Whether a court may toll the operation of a zoning statute prohibiting
the reestablishment of a nonconforming use if the use has been discontinued

“for any reason” for a period of one year, where the applicant did not apply for a special permit to resume the use until less than two months before the expiration of the one-year period?

The court below improperly answered this question in the affirmative.

Statement of Facts

Order being appealed

On September 1, 2005, Metro Enviro Transfer, LLC (“Metro Enviro”) ceased operation of a construction and demolition debris (C&DD) transfer station at 1A Croton Point Avenue in the Village of Croton-on-Hudson, after more than one-and-a-half years of litigation, which ended with the Court of Appeals’ affirming this Court’s determination that the Village properly refused to renew Metro Enviro’s special permit on the grounds of persistent substantial violations of the permit. Metro Enviro Transfer, LLC v. Village of Croton-on-Hudson, 5 N.Y.3d 236, 239-40, 800 N.Y.S.2d 535, 536-37 (2005), affirming 7 A.D.3d 625, 777 N.Y.S.2d 170 (2d Dep’t 2004). (R.4)¹

1. References to the Record on Appeal are denoted “R. __.”

Metro Enviro had leased the site of the transfer station from Greentree Realty, LLC ("Greentree"), the owner of the property, and one of the respondents in this appeal. (R.36) Soon after Metro Enviro was shut down, Greentree sought to lease the site to another entity for the operation of a transfer station by a company misleadingly named Northeast Interchange Railway, LLC ("NIR"),² the other respondent. (R.11)

The parties do not dispute the fact that a transfer station was a nonconforming use in the Village when Metro Enviro was shut down in September 2005. (R.38) The transfer station had been operating under a nonconforming use special permit, issued in 1998. (R.37) Although Greentree and NIR have taken the position in another appeal pending before this Court, Docket No. 2006-4883, that the transfer station operated as a prior legal nonconforming use, and therefore a special permit was not required, that dispute does not impact on the issue in the instant appeal, *i.e.*, whether the court below had any legal basis for tolling the statutory discontinuance period, which was to expire on August 31, 2006.

2. Despite its name, Northeast Interchange Railway is not a railroad at all, but a transfer station operator. (R.40) Greentree's lease was with an affiliate of NIR, RS Acquisition ("RSA"). (R.12, 79) RSA is not a party to this action.

Under the Croton-on-Hudson Zoning Code, a nonconforming use “[s]hall not be reestablished if such use has been discontinued for any reason for a period of one year or more or has been changed to or replaced by a conforming use. Intent to resume a nonconforming use shall not confer the right to do so.” Croton-on-Hudson Code § 230-53.A(3). (R.58)

In July 2006, faced with the impending expiration of the one-year discontinuance period, Greentree and NIR applied to the Westchester County Supreme Court for an injunction tolling “the operation and applicability” of the statutory discontinuance period until there is a final determination on NIR’s special permit application. Critically, for purposes of this appeal, NIR first submitted its special permit application to the Village only a day and a half before it sought the injunction. (R.7, 40)

The application was heard by Hon. Francis A. Nicolai, A.J.S.C., who, in an opinion containing not a single word of reasoning, granted the application and tolled the one-year discontinuance period “for ninety (90) days following a final determination by the municipality with regard to the Special Permit application, without prejudice to Petitioner/Plaintiff to apply for an additional extension.” (R.6) That order is the subject of this appeal.

Greentree and NIR's actions during the one-year discontinuance period

Some time prior to July 29, 2005, NIR contracted to acquire ownership of Metro Enviro, including its lease with Greentree of 1A Croton Point Avenue. (R.75) Once Metro Enviro was finally closed, in September 2005 – at the very beginning of the statutory discontinuance period – NIR applied to the Westchester County Solid Waste Commission for a hauler's license for the purpose of operating a C&DD facility at 1A Croton Point Avenue. (R.75) At approximately the same time, NIR applied for a permit from the New York State Department of Environmental Conservation ("DEC") to operate the transfer station. (R.40)

Neither Greentree nor NIR, however, applied to the Village of Croton-on-Hudson for a nonconforming use special permit, even though the Westchester County Supreme Court (Justice Nicolai) had issued a decision on August 25, 2005 indicating that a special permit was necessary to resume waste transfer operations at the site. (R.71) Rather, in November 2005, the chief executive officer of NIR informed the Croton Village Manager that NIR did not need a special permit and that it would commence C&DD operations at 1A Croton Point Avenue once it received its approvals from

the Solid Waste Commission and DEC. (R.75, 111)

Therefore, in December 2005, the Village applied to the Westchester County Supreme Court for an order enjoining NIR from resuming transfer station operations at 1A Croton Point Avenue without first obtaining, at a minimum, a special permit from the Village.³ (R.35) The Village's application was adjourned repeatedly, each time at the request of Greentree and/or NIR. (R.111) The last extension of the return date was to March 21, 2006. On April 25, 2006, Justice Nicolai issued an order enjoining NIR "from operating a transfer station at the Property without first obtaining a special permit in accordance with the Village's Zoning Code." (R.38)

The Village fully expected to receive an application from Greentree or NIR, and was aware that it was obligated to process any such application promptly. (R.76) The Village did not receive an application, however, until after the close of business on July 5, 2006 – more than two months after Justice Nicolai's second order, and less than two months before expiration of the one-year discontinuance period.

3. In that action, the Village made the alternative argument that, because the nonconforming use special permit had been terminated, the right to operate the use at all terminated as well. That issue is the subject of the appeal cited on page 3.

In spite of NIR's dilatoriness, the Village was far more than accommodating in its efforts to process the application expeditiously. On July 5, 2006, at the request of NIR's attorney, the Village kept its offices open past closing time, so that NIR's attorney could submit its special permit application. (R.76, 107) The Assistant to the Village Manager, Janine King, put the matter on the agenda of the Board of Trustees' meeting of July 10, 2006, even though the application came in beyond the submission date for that meeting. (R.76, 107) On July 6, 2006, a paralegal from NIR's attorney's office telephoned the Village Manager's office to say that he did not expect the Village Board would be meeting so quickly and that he would prefer the application to be on the Board of Trustees' July 24, 2005 agenda. (R.107) Ms. King advised the attorney's office to make certain that they wanted to postpone the application to the July 24th meeting before she removed it from the July 10th agenda. (R.107-08) Eventually, NIR's attorney agreed to the July 10th meeting. (R.108)

The Board of Trustees considered the application at the July 10th meeting and immediately referred the matter to the Planning Board, as required by the Village Zoning Code. (R.76) The Planning Board took up

the application at its July 25, 2006 meeting. (R.108)

The Village, thus, acted with great speed and diligence in processing NIR's special permit application. It is obvious that it was not any action or inaction on the Village's part that held up the processing of NIR's application by August 31, 2006. What made a decision on the special permit by that date virtually impossible (given that the application required review under the State Environmental Quality Review Act), was that Greentree and NIR waited nearly ten months after Justice Nicolai first indicated a special permit would be necessary, to file the application. Indeed, they waited more than two months after Justice Nicolai expressly enjoined NIR from operating a transfer station without a special permit. Greentree and NIR waited until there was less than two months left to obtain the special permit, and a day and a half later, moved "to stop the clock."

Greentree's and NIR's repeated assertions to the Supreme Court that they "did all that is possible to resume the nonconforming use within the one-year statutory period" (R.15, 132-33) are belied by the record. What the record shows is that Greentree and NIR "did all that is possible" to

avoid Village regulation. First, they claimed they did not need a special permit and compelled the Village to bring an action for an injunction. Then they adjourned the Village's action for almost four months. (R.75-76) In another maneuver to avoid the Village's zoning laws, NIR attempted to get a railroad exemption from the federal Surface Transportation Board (STB), even though it was clearly not a railroad. (R.81) Then, when the STB frustrated them in that attempt, they secured an upstate railroad (Buffalo Southern Railroad) to front a C&DD operation at the site and brought an action in federal court claiming, *inter alia*, that as a railroad it is exempt from any local regulation, including zoning. (R.86) (The federal court referred the matter to the STB, which has not yet acted.)

NIR and Greentree, however, did not take the one action that would have allowed their special permit to be processed before the one-year discontinuance period expired: *i.e.*, they did not apply for one in a timely fashion. NIR did not apply for the special permit until July 5, 2006, less than two months before the expiration date. (R.40) (The initial special permit issued to Metro Enviro in 1998 took a total of eight months to process. R.77)

Summary of Argument

According to the Croton-on-Hudson Zoning Code, a nonconforming use “[s]hall not be reestablished if such use has been discontinued *for any reason* for a period of one year or more or has been changed to or replaced by a conforming use. *Intent to resume a nonconforming use shall not confer the right to do so.*” § 230-53.A(3) (emphasis added). This zoning provision is unambiguous: once a nonconforming use ceases for one year – for any reason – the use may not resume.

In their motion papers, Greentree and NIR conceded that a waste transfer station was a nonconforming use at 1A Croton Point Avenue, and they conceded that the nonconforming use would have been discontinued for a year on August 31, 2006. (R.13, 30) In seeking to “toll” the discontinuance period – which the court below imprecisely referred to as the “Abandonment Period” – Greentree and NIR argued that they did “all that is possible to resume the nonconforming use,” (R.15), and that the Village prevented its resumption. Even if those arguments were true – which the record shows they are not – the court below had no legal basis for tolling the statutory discontinuance period.

Argument

POINT I

IT IS SETTLED LAW THAT A ZONING PROVISION THAT PROHIBITS THE OPERATION OF A NONCONFORMING USE AFTER THE USE HAS BEEN DISCONTINUED FOR A FIXED PERIOD MUST BE ENFORCED, IRRESPECTIVE OF AN INTENT OR EFFORTS TO RESUME THE USE DURING THE LAPSE PERIOD.

The Croton-on-Hudson Zoning Code provides that a nonconforming use “[s]hall not be reestablished if such use has been discontinued for any reason for a period of one year or more or has been changed to or replaced by a conforming use. Intent to resume a nonconforming use shall not confer the right to do so.” § 230-53.A(3). This language permits no exceptions.

The Court of Appeals and Appellate Division have consistently enforced discontinuance periods similar to the Croton provision quoted above – irrespective of the property owner’s intent or efforts to continue the nonconforming use. This policy logically flows from the well-settled principle that “[b]ecause nonconforming uses are viewed as detrimental to zoning schemes, public policy favors their reasonable restriction and

eventual elimination.” 550 Halstead Corp. v. Zoning Board of Appeals of the Town/Village of Harrison, 1 N.Y.3d 561, 562, 772 N.Y.S.2d 249, 250 (2003). Accord, Pelham Esplanade, Inc. v. Board of Trustees of the Village of Pelham Manor, 77 N.Y.2d 66, 70, 563 N.Y.S.2d 759, 761 (1990) (referring to “the law’s traditional aversion to nonconforming uses. The policy of zoning embraces the concept of the ultimate elimination of nonconforming uses, and thus the courts favor reasonable restriction of them.”).

In Toys “R” Us v. Silva, 89 N.Y.2d 411, 421, 654 N.Y.S.2d 100, 106 (1996), the discontinuance statute had a provision almost identical to the provision in the Croton statute, *i.e.*, “Intent to resume active operations shall not affect” the determination whether a nonconforming use has been discontinued. The Court of Appeals found that language to be “unique” and to “go[] even one step further,” and it rejected the property owner’s argument that the zoning statute must be interpreted in favor of the landowner. The Court of Appeals ruled that the statutory language was unambiguous in deeming the owner’s intent irrelevant, and that the discontinuance provision had to be enforced. The Court went on to say:

[P]ublic policy specifically supports termination of nonconforming uses, and the [discontinuance statute] itself seeks to achieve "a gradual remedy" for "incompatible" nonconforming uses. As we have stated in a related context: "It has been said in New York that a zoning ordinance must be 'strictly construed' in favor of the property owner * * *. By way of counterpoint, however, it has been said, with equal conviction, that the courts do not hesitate to give effect to restrictions on nonconforming uses * * *. It is because these restrictions flow from a strong policy favoring the eventual elimination of nonconforming uses."

89 N.Y.2d at 421-22, 654 N.Y.S.2d at 106 (citations omitted).

Even in cases where the discontinuance statute did not have the specific intent language included in the Croton-on-Hudson provision (*i.e.*, "Intent to resume a nonconforming use shall not confer the right to do so."), the Courts have consistently ruled that the effect of a statute providing that a nonconforming use that is discontinued for a fixed period may not be resumed, is "to automatically foreclose any inquiry as to the owner's intent to abandon" or resume the use. Sun Oil Co. v. Board of Zoning Appeals of the Town of Harrison, 57 A.D.2d 627, 628, 393 N.Y.S.2d 760, 762 (2d Dep't 1977), affirmed, 44 N.Y.2d 995, 408 N.Y.S.2d 502 (1978). Accord, Darcy v. Zoning Board of Appeals of the City of Rochester, 185 A.D.2d

624, 586 N.Y.S.2d 44 (4th Dep't 1992); Spicer v. Holihan, 158 A.D.2d 459, 460, 550 N.Y.S.2d 943, 944 (2d Dep't 1990); Swartz v. Wallace, 87 A.D.2d 926, 929, 450 N.Y.S.2d 65, 67-68 (3d Dep't 1982) ("the inclusion of a specified time period, reasonable in length, such as here, conclusively forecloses any further inquiry concerning discontinuance of a nonconforming use once nonuse for the requisite period is established").

That Greentree and NIR may have made some efforts to resume C&DD operations at 1A Croton Point Avenue does not affect the application of the discontinuance provision. The unambiguous wording of the Croton discontinuance statute leaves no room for exceptions. Nor does settled New York case law.

In the leading Court of Appeals cases enforcing discontinuance statutes, the property owners had been making efforts to resume the nonconforming use before the discontinuance period expired. In Sun Oil Co. v. Board of Zoning Appeals of the Town of Harrison, 57 A.D.2d at 627, 393 N.Y.S.2d at 761, affirmed on memorandum at Appellate Division, 44 N.Y.2d 995, 408 N.Y.S.2d 502 (1978), a gas station that did not operate for more than ten months (the statutory discontinuance period in Harrison) was

ruled to have lost its nonconforming use status even though attempts were being made to sell or lease the property throughout the discontinuance period. And, in Toys “R” Us v. Silva, 89 N.Y.2d at 415, 654 N.Y.S.2d at 102, the property owner actually resumed warehouse activities during the discontinuance period, but the Court of Appeals ruled that the minimal warehouse activities were not sufficient to protect the warehouse from losing its prior nonconforming use status. (The statutory language in Toys “R” Us was different, *i.e.*, “the active operation of substantially all the non-conforming uses” must be discontinued.)

Two recent Appellate Division decisions are virtually indistinguishable from the instant appeal on this issue. In Vite, Inc. v. Zoning Board of Appeals for Town of Greenville, 282 A.D.2d 611, 723 N.Y.S.2d 239 (2d Dep’t 2001), this Court enforced a discontinuance statute even though the property owner had been making attempts to continue the nonconforming use throughout the lapse period. The property had been used as a group home since prior to the enactment of the Town’s zoning law. When the use lapsed for more than a year, the Court enforced a discontinuance provision identical to the Croton provision, even though the property owner had tried to secure a

tenant who would continue to operate a group home.

Although the petitioner intended to obtain a tenant who would continue the group home use and made several efforts in that regard, it was unable to secure any such tenant, with the result that for a period of more than one year the property was not used as a group home. Thus, there was a clear cessation of the prior nonconforming use, and the petitioner's efforts at securing a new tenant, which merely evinced an intent to continue the use, did not confer a right to continue the nonconforming use after the one-year period lapsed.

282 A.D.2d at 612, 723 N.Y.S.2d at 241.

In Village of Waterford v. Amna Enterprises, Inc., 27 A.D.3d 1044, 812 N.Y.S.2d 169 (3d Dep't 2006), the subject gas station closed in 2002 and, in January 2004, Amna bought it and began selling gas. The Village sought an injunction on the grounds that the property had lost its nonconforming use status because the gas station had closed for more than 12 months. The property owner submitted evidence that the previous owner had been trying to sell the property as a gas station during that 12-month period, but the Court was not persuaded. "[E]vidence that [the previous owner] had been marketing the property for sale during the relevant time period did not confer a right to continue the nonconforming use after the 12-

month period had lapsed.” 27 A.D.3d at 1046, 812 N.Y.S.2d at 170.

Thus, even if Greentree and NIR had “done all that is possible to resume the nonconforming use within the one year statutory period” (R.15) – which, as shown below, they did not – those efforts would not be sufficient to insulate them from the Croton-on-Hudson discontinuance provision. The Croton statute is clear, and established New York case law supports, that where the nonconforming use ceases for 12 months, the right to continue the nonconforming use is lost.

POINT II

EVEN IF IT WERE RELEVANT TO TOLLING
THE STATUTORY DISCONTINUANCE PERIOD
– WHICH IT IS NOT – GREENTREE AND NIR
DID NOT DO “ALL THAT IS POSSIBLE TO
RESUME THE NONCONFORMING USE.”

In any event, the record is clear that Greentree and NIR did not do “all that is possible to resume the nonconforming use.” While they may have done “all that is possible” to avoid the Village’s zoning ordinance – by asserting they did not need a special permit and forcing the Village to seek an injunction, by NIR’s attempting to get a railroad exemption from the federal Surface Transportation Board (STB) even though it is clearly not a railroad, and then by securing an upstate railroad to front their C&DD operation at the site and suing in federal court – they failed to take the one action that would have allowed their special permit to be processed, *i.e.*, to apply for one in a timely fashion. Filing for a special permit less than two months prior to the end of the discontinuance period, during the middle of the summer, when the Village’s boards are on reduced schedules and key personnel are on vacation, is a far cry from doing “all that is possible to resume the nonconforming use.”

Greentree and NIR knew as far back as August 2005 that the Village's position – and, more importantly, Justice Nicolai's position – was that a special permit was required for another company to operate a C&DD transfer station at 1A Croton Point Avenue. Had they applied for the special permit back then, they would not have been faced with the “loudly ticking” statutory clock and the “appointed time fast approaching.” (R.13) By their own account, it took less than eight months for Metro Enviro to secure its special permit in 1998. (R.14) For whatever reason, NIR and Greentree made a calculated choice not to file a timely application, and they must suffer the consequences of that calculation.

NIR and Greentree argued in the court below that they did not file for a special permit sooner because NIR did not close on the sale of Metro Enviro Transfer, LLC until February 2006. (R.16-17) That “excuse” is preposterous. It is clear from the record that NIR knew as early as July 2005 – more than a year before the statutory discontinuance period would expire – that it intended to operate a C&DD facility at 1A Croton Point Avenue. (R.75) On July 29, 2005, NIR stated in a notice it filed with the STB that it had reached an agreement to acquire ownership of Metro Enviro

Transfer, LLC, including its lease with Greentree of 1A Croton Point Avenue. (R.75) And, in September 2005, NIR applied to the Westchester County Solid Waste Commission for a license to operate a C&DD facility at 1A Croton Point Avenue. (R.75, 16) Soon after, it applied to the DEC for a permit. (R.40) Greentree, as the property owner, and/or NIR as the contract vendee/lessee, could have applied for the special permit concurrently with the other steps they were taking to start up waste hauling operations in the Village.

There is also no merit to NIR and Greentree's argument that "the Village's consistent and repeated interference with [their] attempts to re-open the facility" (R.11), prevented them from timely applying for a special permit. None of the actions they complained of in the court below would have prevented the Village's processing a special permit application. As stated by the Village's special environmental counsel, and as demonstrated by the Village's accelerated handling of NIR's special permit application, once it was finally filed, the Village was aware of its obligation to process the application expeditiously. (R.76, 107)

The Village's opposition to the Solid Waste Commission's issuing a

hauler's license, on the grounds that other waste facilities operated by NIR's parent company had appalling records of environmental noncompliance in other states, did not stand in the way of NIR or Greentree applying for a special permit. Indeed, part of the Village's argument to the Solid Waste Commission was that NIR had taken the position that it did not need a special permit from the Village.

In addition, there is no way to construe the Village's seeking an injunction *compelling NIR to obtain a special permit* as interference with NIR's seeking a special permit. NIR forced the Village to start that action, because its chief executive officer informed the Village Manager that NIR did not need a special permit and would resume operation of a C&DD facility once it obtained its county and state approvals. (R.75, 111)

Finally, the Village's holding a public hearing on whether there was a public need for the 1A Croton Point Avenue property *in contemplation of* acquiring it by eminent domain is immaterial to the timing of NIR and/or Greentree's applying for a special permit. The hearing was the first step in a long process. It was just as likely as not that the Village would decide not to condemn the property, and it was foolhardy of NIR and Greentree not to

apply for a special permit.

NIR used every available avenue – including disguising itself as a railroad – to resume waste transfer operations at 1A Croton Point Avenue. It chose not to go down the special permit avenue until the 11th hour, or more precisely the 11th month, and it must accept the consequences of that choice.

This case is not like the rare case in which this Court has tolled a statutory discontinuance period because a municipality unlawfully frustrated the resumption of the nonconforming use. See Incorporated Village of Ocean Beach v. Stein, 110 A.D.2d 820, 488 N.Y.S.2d 239 (2d Dep't 1985); Two Wheel Corp. v. Fagiola, 96 A.D.2d 1098, 467 N.Y.S.2d 66 (2d Dep't 1983). The Village of Croton-on-Hudson did not frustrate NIR/Greentree's attempts to obtain a special permit, and did nothing unlawful to prevent their getting one. Again, the major obstacle to NIR's obtaining a special permit before the statutory discontinuance period lapsed was its refusal to apply for one until the eve of the expiration date.

POINT III

THAT GREENTREE MAY LOSE VALUABLE
PROPERTY RIGHTS IS NOT RELEVANT TO
THE OPERATION OF THE CROTON-ON-
HUDSON DISCONTINUANCE PROVISION
FOR NONCONFORMING USES.

Greentree and NIR's repeated arguments in the court below about losing valuable property rights are tautological. The loss of valuable property rights is part and parcel of the discontinuance of any nonconforming use. Sun Oil and Amna were losing their rights to operate a gas station on their property; Vite was losing its right to operate a group home; Spicer was losing its right to operate a tavern, and so on. Sun Oil Co. v. Board of Zoning Appeals of the Town of Harrison, 57 A.D.2d 627, 393 N.Y.S.2d 760; Village of Waterford v. Amna Enterprises, Inc., 27 A.D.3d 1044, 812 N.Y.S.2d 169; Vite, Inc. v. Zoning Board of Appeals for Town of Greenville, 282 A.D.2d 611, 723 N.Y.S.2d 239; Spicer v. Holihan, 158 A.D.2d 459, 550 N.Y.S.2d 943.

The same argument, that the enforcement of a discontinuance period for a nonconforming use results in a loss of property rights, was rejected in one of the earliest cases on this question. In Sun Oil, the property owner

challenged a discontinuance period as confiscatory. The Court of Appeals rejected the argument and held that the discontinuance provision “does not prevent petitioner ‘from using his property for any purpose for which it is reasonably adapted.’” 57 A.D.2d at 628, 393 N.Y.S.2d at 762, affirmed on memorandum at Appellate Division, 44 N.Y.2d 995, 408 N.Y.S.2d 502.

Similarly, Croton-on-Hudson’s discontinuance provision does not prevent Greentree from leasing its property for one of the many uses permitted in the Village’s Light Industrial LI zoning district.

Conclusion

Under well established New York law, the lower court had no basis for tolling Croton-on-Hudson's statutory discontinuance period for nonconforming uses. The Village of Croton-on-Hudson respectfully requests this Court to reverse the lower court's order, and to award it such other relief as the Court deems just and proper, including costs.

Dated: Tarrytown, New York
February 13, 2007



Marianne Stecich
Stecich Murphy & Lammers, LLP
Attorneys for Appellants, The Village of
Croton-on-Hudson, The Village
Board of Trustees of the Village of
Croton-on-Hudson, The Village
Zoning Board of Appeals, and
Daniel O'Connor, as the Village
Building Inspector
828 South Broadway, Suite 201
Tarrytown, New York 10591
(914) 674-4100

Certification of Compliance

I, Marianne Stecich, attorney for Appellants, The Village of Croton-on-Hudson, The Village Board of Trustees of the Village of Croton-on-Hudson, The Village Zoning Board of Appeals, and Daniel O'Connor, as the Village Building Inspector, do hereby certify, pursuant to Rule § 670.10.3 of the Rules of the Appellate Division, Second Department, as follows:

1. This brief was prepared on a computer word processor.
2. The type face used is Times New Roman, 14 point.
3. The margins are at least one inch.
4. Except for point headings, long quotations, and tables, the brief is double-spaced.
5. This brief, excluding tables, includes a total of 4,632 words.

Dated: Tarrytown, New York
February 13, 2007



Marianne Stecich